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May 5, 2003

VIA COURIER

Mark Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: ***United States of America, Appellee v. Microsoft Corporation, Appellee, Computer & Communications Industry Association (CCIA) and Software & Information Industry Association (SIIA), Appellants*, No. 03-5030.**

Dear Mr. Langer:

Enclosed for filing in the above-referenced matter please find one original and nineteen copies of the Proof Brief of Appellants Computer and Communications Industry Association (CCIA) and Software and Information Industry Association (SIIA).

An electronic (.pdf) copy of the filing has been emailed to your office in accordance with the Court's March 26, 2003, scheduling order.

We will file a separate electronic copy of the brief on CD-ROM on or before May 14, 2003, in accordance with the Court's May 2, 2003 order. Thank you.

Sincerely,

Elizabeth S. Petrela

Enclosures

SCHEDULED FOR ORAL ARGUMENT ON NOVEMBER 4, 2003

No. 03-5030

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

AND

THE SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION,

Appellants,

v.

THE UNITED STATES OF AMERICA

AND

MICROSOFT CORPORATION,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

PROOF BRIEF OF APPELLANTS COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA) AND SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION (SIIA)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici.* Appellee the United States of America was the plaintiff in the proceedings below. Appellee Microsoft Corporation was the defendant in the proceedings below. Appellants participated as *amicus curiae* in the proceedings below. In addition, the following individuals and entities were permitted to participate as *amicus curiae* in the District Court: SBC Communications, the Project to Promote Competition and Innovation in the Digital Age (ProComp), the States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, the American Antitrust Institute (AAI), the Association for Competitive Technology (ACT), NetAction, Computer Professionals for Social Responsibility (CPSR), Novell, Inc., and Consumers for Computing Choice and Open Platform Working Group. As of the date of this filing, neither these nor any other entities have been granted party status or have otherwise been granted leave to appear before this Court.

Rulings Under Review. This appeal challenges the final order entered by the United States District Court for the District of Columbia (Kollar-Kotelly, J.) on January 11, 2003, denying Appellants' motion to intervene in this case for purposes of appealing the District Court's Final Judgment, entered on November 12, 2002, in the proceedings below. The Final Judgment approves the consent

decree submitted by the parties below and incorporates all of the court's prior rulings in the case, including the District Court's order and opinion dated July 1, 2002, holding that the parties met their procedural obligations under the Tunney Act, 15 U.S.C. § 16.

The District Court's January 11 order denying Appellants' motion for intervention is reported at *United States v. Microsoft Corp.*, No. 98-1232, 2003 WL 262324 (D.D.C. Jan. 11, 2003). The District Court's Final Judgment approving the consent decree is reported at *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002). The District Court's July 1 order and opinion holding that the parties met their procedural obligations under the Tunney Act is reported at *United States v. Microsoft Corp.*, 215 F. Supp. 2d 1 (D.D.C. 2002).

Related Cases. The liability phase of this case was previously reviewed by this Court in the consolidated appeal *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*) (*en banc*). On remand, the case was severed into the case below, *United States v. Microsoft Corp.*, D.D.C. No. 98-1232, and the separate litigation by 21 state attorneys general in *State of New York, et al. v. Microsoft Corp.*, D.D.C. No. 98-1233.

The appeal from the remedy proceedings in *State of New York, et al. v. Microsoft Corp.*, D.D.C. No. 98-1233, is currently before this Court in Nos. 02-

7155 (*State of New York et al. v. Microsoft Corp.*, Commonwealth of Massachusetts, Plaintiff-Appellant) and 02-7156 (*State of New York, et al. v. Microsoft Corp.*, State of West Virginia, Plaintiff-Appellant). These consolidated appeals are closely related to this case because they challenge the District Court's failure to award relief beyond that specified in the consent decree.

Two other related cases are currently pending before the federal courts. The first is the appeal to the United States Court of Appeals for the Fourth Circuit in *Sun Microsystems, Inc. v. Microsoft Corp.*, No. 03-1116. The second is the multi-district litigation currently pending in the United States District Court for the District of Maryland in *In re Microsoft Corporation Antitrust Litigation*, MDL Docket No. 1332. These cases are related to this appeal because they involve, in the context of private antitrust litigation, issues regarding the relief necessary to remedy the antitrust violations affirmed by this Court.

CORPORATE DISCLOSURE STATEMENT

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industry. SIIA has approximately 650 members that develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members include software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. SIIA's membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies. A complete list of SIIA's members is publicly available at <http://www.siia.net/glance/members.asp>. SIIA has participated extensively in many phases of this case as *amicus curiae*, including the liability phase in the District Court in which SIIA filed, at Judge Jackson's request, a joint brief with Appellant CCIA regarding the extent of Microsoft's antitrust liability. SIIA is a non-profit organization and no one has stock or ownership interests in it. Consequently, SIIA is neither a privately nor publicly held company. It has no parent organization, and no publicly held company owns 10% or more of SIIA.

The Computer & Communications Industry Association is a trade association that has represented computer technology and telecommunications companies, many of whom directly compete with or are customers of Microsoft, for nearly 30 years. CCIA's member companies, listed on the association's

website at <http://www.ccianet.org/membership.php3>, range from small start-ups to global leaders that operate in all aspects of the high-tech economy. CCIA's members include computer and communications companies, equipment manufacturers, software developers, service providers, resellers, integrators and financial services companies. Like SIIA, CCIA has participated as *amicus curiae* in several phases of this case. CCIA is a non-profit organization and no one has stock or ownership interests in it. Consequently, CCIA is neither a privately nor publicly held company. It has no parent organization, and no publicly held company owns 10% or more of CCIA.

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GLOSSARY

API	Application programming interface. APIs "exposed" by a computer program, such as an operating system or middleware, that provide other computer programs with means of access to blocks of code that perform particular tasks, such as displaying text on the computer screen. (FF ¶ 2)
CIS	The "Competitive Impact Statement" filed by the DOJ on November 15, 2001, as required by Section 2(b) of the Tunney Act, and reported at 66 Fed. Reg. at 59,452 (Nov. 28, 2001). (R.650)
DOJ	The United States Department of Justice. Also referred to as the "Government" and the "United States".
FF	Findings of fact in the District Court's November 5, 1999 order. *See United States v. Microsoft Corp.,* 84 F. Supp. 2d 9 (D.D.C. 1999).
Final Judgment	The District Court's November 12, 2002, order approving the consent decree. (R. 746)
IAP	Internet Access Provider. A company, like America Online, that provides computer users with access to the Internet. (FF ¶15)
IE	Internet Explorer, Microsoft's Web browser. (FF ¶ 17)
Intel-compatible PC	A PC designed to use a microprocessor in, or compatible with, Intel's 80x86/Pentium microprocessor family. (FF ¶ 3)
Internet	A global electronic network of computers. (FF ¶ 11)
ISV	Independent software vendor. A developer of applications. (FF ¶ 28)
Java	A programming language and related middleware that enable applications written in that language to run on different operating systems. (FF ¶ 73)
JVM	Java Virtual Machine. A program that translates Java bytecode (which a Java compiler has produced from sourcecode written in the Java language) into instructions that the operating system can

	understand. (FF ¶ 73)
Middleware	Software that relies on APIs provided by the operating system on which it runs, but also exposes its own APIs. (FF ¶ 28)
Navigator	Netscape Communications Corporation's Web browser. (FF ¶ 17)
OEM	Original equipment manufacturer. A manufacturer of PCs. (FF ¶10)
OS or Operating System	A software program that controls the allocation and use of computer resources. (FF ¶2)
PC	Personal computer. A digital information processing device designed for use by one person at a time. (FF ¶ 1)
Platform	Software, like an operating system or middleware, that exposes APIs. (FF ¶ 2)
Port, or Porting	Adapting an application program written for one OS to run on a different OS. (FF ¶ 4)
Web	The World Wide Web. A massive collection of digital information resources stored on servers throughout the internet, typically provided in the form of hypertext documents, commonly referred to as "Web pages." (FF ¶ 12)
Web Browser (or Browser)	Software that enables a user to select, retrieve, and perceive resources on the Web. (FF ¶ 16)
Windows	A family of software packages produced by Microsoft, each including an operating system. The principal members of this family for purposes of this case are Windows 95, Windows 98, and successors, which include operating systems for Intel-compatible PCs. (FF ¶ 6-8)

STATEMENT AS TO STATUTES AND REGULATIONS

Pertinent statutes and regulations are bound with this brief as Addendum A.

JURISDICTIONAL STATEMENT

CCIA and SIIA appeal from the District Court's final judgment, entered on January 11, 2003, denying their motion for leave to intervene for purposes of appeal, and from the District Court's final judgment, entered on November 12, 2002, approving the parties' proposed consent decree under the Tunney Act, 15 U.S.C. § 16(b). The District Court had jurisdiction over the proceedings below pursuant to 15 U.S.C. § 4, 28 U.S.C. § 1331, and 15 U.S.C. § 16(b). This Court has jurisdiction under 28 U.S.C. § 1291 to hear this appeal of the District Court's final orders.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in denying Appellants' motion for leave to intervene for purposes of appeal; and

2. Whether the District Court erred in approving the parties' proposed consent decree under the Tunney Act, 15 U.S.C. § 16(b), even though: (1) the decree violates this Court's mandate and settled requirements of antitrust law by failing to remedy Microsoft's violations of the Sherman Act, 15 U.S.C. § 2; and (2) the parties failed to comply fully with the Tunney Act's procedural requirements.

STATEMENT OF THE CASE

The proposed consent decree between the United States and Microsoft should not have been approved because it fails to remedy Microsoft's predatory practices that were ruled illegal by this unanimous *en banc* Court. *See United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001). Refusing to prohibit the practices held unlawful in this very case cannot be "in the public interest." 15 U.S.C. § 16(b).

Perhaps the best example of the many fatal defects in the decree is its failure to remedy Microsoft's illegal commingling of operating system (OS) and middleware code, the method by which Microsoft bolted its Internet Explorer browser to its monopoly Windows operating system in order to preserve that monopoly. The decree does nothing to constrain the commingling of any middleware and OS code. To the contrary, it permits Microsoft to determine "in its sole discretion" what software constitutes Windows, which means not only that Microsoft may commingle code without restraint but may withhold critical programming interfaces from actual or potential rivals. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 166 (D.D.C. 2002) (R.741). Had this decree been in effect in 1995, it would not have prohibited Microsoft's proven antitrust violations against Netscape and Java. *See Microsoft,* 253 F.3d at 50-79. That is indefensible.

As the District Court correctly stated, in order to unfetter a market from anticompetitive conduct, an antitrust decree must eliminate "practices likely to result in monopolization in the future." *Microsoft*, 231 F. Supp. 2d 144, 154 (D.D.C. 2002) (quoting *Microsoft*, 253 F.3d 34, 103 (D.C. Cir. 2001) (*per curiam*) (*en banc*)). Yet the court approved a consent decree that neither cures what has been done illegally in the past nor prevents illegal conduct in the future.

In approving the settlement, the District Court held that this Court "appears" to have adopted a test of the "proportionality between the severity of the remedy and the strength of the evidence of the causal connection." *Microsoft*, 231 F. Supp. 2d at 164. This Court's discussion of causation concerned the availability of structural relief. *See Microsoft*, 253 F.3d at 80. The District Court transformed that discussion into a general law for all relief, including conduct remedies. *See Microsoft*, 231 F. Supp. 2d at 164. That defies this Court's ruling. *See infra* at pp. 24-25. If the District Court's causation standard were correct, a monopolist could always strangle a new competitor in its crib and then claim immunity because no one could possibly prove that absent the strangulation, the nascent competitor would in fact have succeeded in eroding the defendant's monopoly power. The message sent by such a rule is that monopolists should destroy incipient competition the moment it appears and that antitrust courts will not condemn that predatory tactic.

* * * * *

In February 2001, this Court heard Microsoft's appeal contesting its antitrust liability *en banc* and reached a unanimous conclusion: Microsoft had unlawfully maintained its Windows monopoly through a dozen separate violations of the antitrust laws. *See Microsoft*, 253 F.3d at 50-97. This Court then remanded the case to the District Court to fashion a remedy that "seek[s] to 'unfetter [the] market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *Id.* at 103 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)).

Two years later, this case returns to this Court in a profoundly different posture. The DOJ — after years of litigation and what it termed a "terrific victory" on appeal, Tr. 19:2 (3/6/02) (Beck) (R.731) — settled the suit in return for wholly inadequate conduct remedies that fail to carry out this Court's mandate in any respect. The resulting consent decree does not achieve any of the remedial objectives identified by this Court and leaves Microsoft in an even stronger market position than it was when this case began. *Microsoft,* 253 F.3d at 103.

The decree is equally inadequate in constraining Microsoft's future violations of the antitrust laws. Microsoft's negotiations with the Government

produced loopholes the size of triumphal arches through which Microsoft may march undeterred by the antitrust laws. The remedies the decree purports to impose are meaningless because Microsoft may define many of its obligations "in its sole discretion." *Microsoft,* 231 F. Supp. 2d at 166. It comes as no surprise, therefore, that more than a year and a half after the decree went into effect, there has been no meaningful increase in competition in the marketplace. To the contrary, the evidence is that Microsoft has continued to expand its dominance over middleware markets, illegally suppressing the potential emergence of new platform threats.

Congress passed the Tunney Act to prevent consent decrees that deprive the public of the benefits of the antitrust laws. *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995); *United States v. Airline Tariff Pub. Co.*, 836 F. Supp. 9, 11-12 (D.D.C. 1993). In the typical case, a consent decree deprives the public of hypothetical benefits because the Government settles before trial. The consent decree in this case deprives the public of far more than just hypothetical benefits; it deprives the public of actual benefits mandated by this Court. The Government cannot plead uncertainty about its prospects: it has already won. Enacted to "prevent 'judicial rubber stamping' of the Justice Department's proposed decree," the Tunney Act requires that before a federal court may approve a settlement, the court must make an "independent

determination" that the proposed decree would serve "the public interest" by ending the defendant's anticompetitive conduct. *Microsoft*, 56 F.3d at 1458 (quoting S. Rep. No. 298, at 5, 8 (1974)). Because the decree in this case fails to remedy Microsoft's proven antitrust violations, the District Court's decision approving it must be set aside. *See Microsoft*, 253 F.3d at 103; *see also, e.g., Airline Tariff*, 836 F. Supp. at 11-12 (a decree should be approved only if it "meets the requirements for an antitrust remedy").

Concerned about the anticompetitive effects of the District Court's approval of the parties' decree, CCIA and SIIA petitioned the court for leave to intervene for the limited purpose of appealing its ruling. *See* Motion to Intervene at 1 (R.764). CCIA and SIIA emphasized that they are appropriate intervenors because they represent numerous companies adversely affected by Microsoft's proven antitrust violations, including the very companies this Court identified as the primary victims of Microsoft's illegal campaign.[1] *See id.* at 10-11 (citing *Mass Sch. of Law at Andover, Inc. (MSL) v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997)). Ignoring established precedent, the District Court denied the petition on the ground that the court had already found the settlement "in the public interest." *See United States v. Microsoft*, No. 98-1232, 2003 WL 1191451, at *5 (D.D.C. 2003) (R.771).

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[1] *See Microsoft*, 253 F.3d at 50-78. The associations' complete membership lists are available on the Internet. *See* http://www.ccianet.org/membership.php3; http://www.siia.net/glance/members.asp.

This reasoning is entirely circular and defeats the purpose of the Tunney Act. On the District Court's theory, no one could ever intervene to appeal the approval of a consent decree. That is not the law. *See* 15 U.S.C. § 16(b).

The District Court's denial of intervention should be reversed and, on the merits, the consent decree should be vacated and the case remanded for the entry of a proper decree.

STATEMENT OF FACTS

A. Background.

This Court, sitting *en banc*, unanimously affirmed the District Court's central holding that Microsoft had maintained its Windows monopoly in violation of Section 2 of the Sherman Act. *See Microsoft*, 253 F.3d at 59-78.[2] In remanding the case, this Court made clear that an effective remedial decree "must seek to unfetter [the] market from anticompetitive conduct, to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that

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[2] The Court reversed the District Court's determination that some of Microsoft's other business practices also violated Section 2, and reversed the District Court's conclusion that Microsoft's unlawful maintenance of its operating systems monopoly doubled as an illegal attempt to monopolize the market for web browsers. *See Microsoft*, 253 F.3d at 46, 50-84. The Court then vacated and remanded for further legal analysis the District Court's holding that Microsoft unlawfully tied its web browser to Windows. *See id.* at 94. Finally, because it had narrowed the District Court's conclusions on liability and found procedural defects in the remedy proceedings below, the Court vacated and remanded the District Court's order mandating Microsoft's divestiture. *See id.* at 103-117.

there remain no practices likely to result in monopolization in the future." *Id.* at 103 (quotation marks and citations omitted). The Court faulted the District Court for failing to hold an evidentiary hearing on these issues or otherwise to explain how its divestiture remedy served these goals. *See id.*

B. District Court Proceedings on Remand.

On remand, the consolidated cases were reassigned to Judge Colleen Kollar-Kotelly, who ordered the parties to file a Joint Status Report identifying the issues that remained for resolution. *See* Order at 2 (8/28/01) (R.621). The DOJ informed Microsoft that it would no longer pursue either its Section 1 tying claim or its request for a structural remedy for Microsoft's established antitrust violations. *See* Joint Status Report at 2 (9/20/01) (R.628). Shortly after receiving the parties' proposed trial schedule, the court ordered the parties to "enter into intensive settlement negotiations." *Microsoft*, 231 F. Supp. 2d at 150. The court's order, dated September 28, 2001, stated that: "In light of the recent tragic events affecting our nation, this court regards the benefit which will be derived from a quick resolution of these cases as increasingly significant . . . . The court cannot emphasize too strongly the importance of making these efforts to settle the cases and resolve the parties' differences in this time of rapid national change." Order at 1-2 (9/28/01) (R.634). The court did not explain how the merits of the issues here were affected by the attacks of September 11 and the subsequent "time of rapid

national change." *Id.* Little more than a month later, the United States and Microsoft announced that they had agreed on a Revised Proposed Final Judgment. *See* Status Report (11/6/01) (R.646); Joint Stipulation (11/6/01) (R.647).[3]

C. The DOJ's Competitive Impact Statement.

On November 15, 2001, the United States filed its "competitive impact statement" ("CIS") describing the proposed settlement as required by Section 2(b) of the Tunney Act. *See* Competitive Impact Statement (11/15/01) (R.650); 15 U.S.C. § 16(b). The CIS briefly surveyed the litigation efforts preceding negotiation of the consent decree but failed to provide other information required by the statute. *See* CIS at 1-9 (R.650); 15 U.S.C. § 16(b)(1)-(6). The CIS did not identify, for example, the "unusual circumstances giving rise to [the decree]," 15 U.S.C. § 16(b)(3), or the "materials and documents [that the DOJ] considered determinative in formulating [the settlement] proposal," *id.* § 16(b). Nor did it supply the requisite "evaluation" of proposed alternatives to the decree's remedial provisions. *Id.* § 16(b)(6); *see* CIS at 5-9 (R.650).

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[3] Following the liability trial in the District Court, the United States had sought and obtained interim conduct restrictions to prevent Microsoft from engaging in anticompetitive conduct in the months preceding its divestiture. *See United States v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. 2000) (final judgment imposing divestiture). Acknowledging the remedial problem created by its abandonment of structural relief following remand, the DOJ promised to offer in compensation strengthened conduct relief modeled upon the interim "conduct-related provisions" previously fashioned by the District Court. Joint Status Report at 2 (9/20/01) (R.628).

Microsoft's Disclosure of Its Contacts With the Government. Approximately two weeks after the DOJ published the CIS, Microsoft, pursuant to Section 2(g) of the Tunney Act, filed a description of its communications with the United States regarding the proposed settlement. *See* Msft. § 2(g) Disc. Stmt. (12/10/01) (R.652). Section 2(g) requires a "true and complete" description of "any and all written or oral communications" by or on a defendant's behalf with "any officer or employee of the United States concerning or relevant to" a proposed consent decree. 15 U.S.C. § 16(g). Only communications between "counsel of record alone" and "employees of the Department of Justice alone" are excluded from this broad disclosure obligation. *Id.*

At the time Microsoft filed its disclosure statement, the Government had been pursuing antitrust litigation against Microsoft for six years and Microsoft had not only engaged in extensive settlement negotiations with the DOJ, *see Microsoft,* 253 F.3d at 47-48, but since 1998 had engaged in an intense lobbying campaign to end the federal antitrust litigation against it.[4] Yet the Section 2(g) disclosure that Microsoft filed on December 10, 2001 was: (1) limited to a roughly two-month

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[4] *See, e.g.*, Ian Hopper, *Microsoft Lobbied Congress Over Case,* SAN JOSE MERCURY NEWS, Jan. 11, 2002, at 3C; Rajiv Chandrasekaran & John Mintz, *Microsoft's Window of Influence; Intensive Lobbying Aims to Neutralize Antitrust Efforts*, WASH. POST, May 7, 1999, at A01; James V. Grimaldi & Jay Greene, *Microsoft Trial: Company Hard At Work Outside the Courtroom,* SEATTLE TIMES, Feb. 17, 1999, at A1; *Microsoft's Political Donation in Question; South Carolina GOP Says Decision to Quit Lawsuit Coincidental*, CHI. TRIB., Dec. 25, 1998, at 3.

period that began on September 28, 2001; and (2) disclosed "in very general terms" only "two communications by or on behalf of Microsoft with any officer or employee of the United States." *Microsoft*, 215 F. Supp. 2d at 19 (citing Msft. § 2(g) Disc. Stmt. (12/10/01) (R.652)).

At the March 6, 2002, hearing on the proposed settlement, the District Court "inquired as to the time period covered by Microsoft's disclosure" and Microsoft responded by "opt[ing] to supplement its December 10, 2001, [filing] to include relevant communications during the period commencing with the issuance of [this Court's] mandate on August 24, 2001." *Id.* (citing Msft. Supp. § 2(g) Disc. Stmt. (3/20/02) (R.732)). This amendment resulted in the disclosure of only one additional "communication." *Id.* (citing Msft. Supp. Disc. at 1 (3/20/02) (R.732)).

D. Publication of, and Comment On, the Proposed Decree.

On November 28, 2001, the United States published the CIS and the RPFJ for comment in the Federal Register. *See* Notice of Filing (R.651); 66 Fed. Reg. at 59,452 (Nov. 28, 2001). The response from the public was overwhelming. The DOJ "received 32,392 comments on the proposed final judgment and provided the final text of these comments to the Court on February 28, 2002." *Microsoft*, 215 F. Supp. 2d at 151.

Appellants' comments, supported by affidavits from renowned economists including Nobel laureate Joseph Stiegliz, set forth criticisms of the proposed

settlement echoed in many other submissions.[5] These filings identified fundamental legal and technical flaws in the decree's treatment of various issues, notably:

- *Illegal Commingling of Middleware Applications with the Windows OS.* The vast majority of comments identified the decree's failure to address the illegal commingling of OS and middleware code as a prime example of the settlement's inability to remedy Microsoft's Section 2 violations. *See, e.g.*, CCIA Comments at 45-54; AOL Comments at 17-24; AAI Comments at 13-18.

- *API and Communications Protocol Disclosures.* The comments uniformly concluded that these provisions were so ambiguous or inadequate that they were competitively meaningless. *See, e.g.*, ProComp Comments at 36-55; SIIA Comments at 25-36.

- *Icon-Focused OEM Flexibility.* These provisions were similarly criticized as ineffective because they do not prevent Microsoft from illegally ensuring that its own middleware code and applications will be present on, and invoked by, every Windows PC. *See, e.g.*, CCIA Comments at 44-59; SBC Comments at 54-60.

- *Microsoft's Suppression of Netscape and Java.* The decree's remedial provisions were criticized for failing to deprive Microsoft of the "fruits" of its illegal conduct by restoring the competitive environment that Microsoft destroyed in the course of its illegal campaign against Netscape and Java. *See, e.g.*, ProComp Comments at 25-33; SBC Comments at 26-28; Litan/Noll/Nordhaus Comments at 40-47.

- *Oversight and Enforcement.* Public comments on the settlement also strongly criticized the decree for (1) vesting oversight of the decree with a technical committee that was neither independent nor qualified to make legal determinations; and (2) severely limiting public disclosure of compliance reports and the Committee's enforcement

[5] The Appellants' Tunney Act submissions, along with those of other commentators, were filed with the District Court on CD-ROM. *See* Notice of Filing (R.709).

authority. *See, e.g.*, CCIA Comments at 89-93; AOL Comments at 50-53.

E. Order Certifying Compliance With the Tunney Act's Procedures.

On May 9, 2002, the United States certified that it had "complied with the provisions" of the Tunney Act. *See* Certificate of Compliance (5/9/02) (R.735). Shortly thereafter, the District Court filed an opinion stating that the Act governed approval of the proposed decree and that the parties had complied with all of its procedural requisites. *See United States v. Microsoft Corp.*, 215 F. Supp. 2d 1, 2 (D.D.C. 2002) (R.736).

Addressing the DOJ's efforts to meet its disclosure obligations under Section 16(b), the court acknowledged that numerous public comments had questioned the DOJ's representation that it did not rely on *any* "determinative documents" subject to 16(b) disclosure in the course of "formulating" its settlement with Microsoft. *Id.* at 10-11. The court further acknowledged that at least two other courts had interpreted the Tunney Act to require some form of judicial review of the Government's disclosures. *See id.* at 11 & n.11. But the court ultimately concluded that the determination whether documents had to be disclosed under the Act was a decision committed entirely to the discretion of the United States, *id.* at 11-12, and, accordingly, it held that the DOJ had complied with its obligations under the statute.

The court next dismissed the wide-ranging public criticism of the DOJ's Competitive Impact Statement, *see id.* at 12-17, holding that the public's submission of some 32,000 comments on the settlement was evidence that the CIS contained enough information to facilitate the debate envisioned by the Tunney Act. *See id.* at 13-14.

The court similarly dismissed criticisms that the DOJ failed to discharge its obligation to provide a "description and evaluation" of "alternatives to the proposed final judgment," opining that the Tunney Act did not require an "exhaustive study" of alternatives. *Id.* at 15 (internal quotations and citations omitted). The court thus held that the CIS's "outlin[e] of [] alternatives" was "more than sufficient" even though it did "not contain the same level of detail" as, for example, the CIS filed in *AT&T*, a case that never reached final judgment on liability. *Id.* at 14 & n.13; 15-17 (citing *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982)).

The District Court then turned to the final issue in its opinion – Microsoft's obligation to disclose its contacts with the Government. *See Microsoft*, 215 F. Supp. 2d. at 18. The court noted that it had itself "inquired" about the adequacy of Microsoft's December 10, 2001, filing (which was limited to a two-month period beginning on September 28, 2001), but that Microsoft had subsequently agreed to amend its disclosure to include communications "commencing with the

issuance of [this Court's] mandate on August 24, 2001." *Id.* at 19. The court then held that the amended disclosure, which included only one additional communication, was sufficient to discharge Microsoft's obligation under Section 16(g) even though "Microsoft clearly could have been more fulsome in its descriptions" of its contacts with the Government and "the continued silence of the United States – a party with relevant knowledge [of the sufficiency of Microsoft's disclosures] – is less than encouraging." *Id.* at 21, 22 n.20.

F. Approval of the Settlement as "In the Public Interest."

On November 1, 2002, the District Court issued its opinion approving the proposed consent decree as "in the public interest." *See United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 149 (D.D.C. 2002) (R.740). Although it identified this Court's liability opinion as the "underpinning" of its "analysis of the proposed decree," *id.* at 154, the District Court held that it was obliged to "accord deference to the 'government's predictions as to the effect of the proposed remedies.'" *Id.* at 152. Applying this deferential standard, the court approved the decree, *see id.* at 164-202, and denied the Appellants' motion to intervene to challenge its decision in this Court.[6] *See United States v. Microsoft Corp.*, No. 98-1232, 2003 WL 262324, at *4 (D.D.C. Jan. 11, 2003) (R. 770).

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[6] The District Court's approval of the decree was conditioned only on the modification of its jurisdictional provision allowing the Court to "act *sua sponte* to (Continued...)

This appeal followed.

SUMMARY OF THE ARGUMENT

The Tunney Act encourages third parties to intervene in cases governed by the statute to ensure that district courts adhere to the Act's requirements in approving proposed consent decrees. *See* 15 U.S.C. § 16(f)(3). As this Court has recognized, private antitrust plaintiffs whose claims parallel those of the Government should be permitted to intervene for purposes of appeal where they have shown "substantial grounds for upsetting" a proposed settlement. *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 782-83 (D.C. Cir. 1997). CCIA and SIIA, which represent the very firms victimized by Microsoft's illegal conduct, presented the District Court with ample grounds for questioning the adequacy of the parties' decree. Accordingly, the District Court erred in denying their motion for intervention.

The District Court's ruling on the merits similarly cannot stand. This Court's mandate on remand was clear: fashion a remedy for Microsoft's antitrust violations that would terminate Microsoft's unlawfully maintained monopoly, unfetter the OS market from anticompetitive conduct, and deprive Microsoft of the fruits of its illegal acts. *See Microsoft*, 253 F.3d at 103. The parties' decree

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order certifications of compliance and other actions by the parties." *Microsoft,* 231 F. Supp. 2d at 258; *see also* Final Judgment § VII (R.746).

accomplishes none of these objectives. The consent decree fails to remedy even the specific practices that this Court unanimously held to be illegal. For example, the consent decree permits Microsoft to continue the illegal technical integration of Windows and Internet Explorer that Microsoft used to protect its monopoly from middleware competition. The decree also fails to provide any remedy for Microsoft's unlawful acts against Java technology. In short, instead of terminating Microsoft's unlawfully maintained monopoly or depriving Microsoft of the fruits of its violations, the decree leaves untouched the applications barrier unlawfully fortified by Microsoft's blatant violations of the Sherman Act.

The decree does no more to prevent Microsoft from harming future middleware competition than it does to remedy Microsoft's past misconduct. If new middleware technology were to appear today, Microsoft could illegally drive it from the market through code integration, deception, and other predatory tactics without violating the District Court's final judgment. For example, the decree's API disclosure and other technical provisions do nothing to encourage future middleware competition because they fail to lower the applications barrier illegally fortified by Microsoft's violations of the Sherman Act. By giving Microsoft the power to define the scope of its obligations and requiring the disclosure only of technical information needed to run Microsoft's own middleware, the decree allows Microsoft to deprive would-be competitors with broader or better products

of the information they need to ensure that those products will run on Windows. As a result, the decree permits Microsoft to control the pace of innovation and prevent the emergence of any serious middleware threat.

The consent decree's failings do not end here. The decree makes even the inadequate remedies it imposes ambiguous and impossible to enforce by leaving critical terms like "Windows Operating System" and "Microsoft Middleware" for Microsoft to define through packaging decisions or simply in "its sole discretion." The decree thus vests Microsoft with the power to define the scope of its obligations under the court's final judgment. To compound the problem, the decree provides no useful means of oversight or enforcement, leaving compliance monitoring to a Technical Committee that has neither the expertise nor the authority to prevent Microsoft from further violating the antitrust laws. For all these reasons, the decree cannot satisfy the public interest in effective antitrust enforcement.

The District Court's decision nonetheless to approve the decree ignores the settlement's many substantive flaws and the parties failure to comply with the Tunney Act's detailed procedural requirements. The DOJ's failure to disclose its reasons for accepting and ineffectual remedies in the decree and Microsoft's failure to disclose its lobbying contacts with the Government together deprived the court of the information required to engage in the independent and informed review of

the settlement required by the Tunney Act. Accordingly, the District Court's judgment approving the decree must be set aside.

ARGUMENT

I. APPELLANTS' MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED.

A. Intervention in Tunney Act Proceedings.

Courts considering requests for intervention in Tunney Act cases have consistently recognized the statute's provisions broadly authorizing third-party participation. *See* 15 U.S.C. § 16(f)(3) (district courts may "authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearances *amicus curiae*, [and] intervention as a [third] party"); *MSL*, 118 F.3d 776 (D.C. Cir. 1997); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995); *United States v. American Cyanamid Co.*, 719 F.2d 558, 563 (2d Cir. 1983); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 219 (D.D.C. 1982) These provisions encourage courts to permit intervention because parties to a consent decree will rarely, if ever, appeal a district court decision approving a proposed settlement. Intervention is thus the only vehicle for subjecting approved decrees to the kind of rigorous appellate review contemplated by the Act.

Applying Federal Rule of Civil Procedure 24(b)'s intervention requirements in a Tunney Act case, this Court has held that intervention should be granted if the

movant can demonstrate (i) issues of "fact or law" in "common" with the Government litigation, and (ii) that the delay in finality caused by an appeal would not be "undue" because there is a sufficient likelihood that grounds exist for "upsetting the consent judgment." *MSL,* 118 F.3d at 782-83 (citing Fed. R. Civ. P. 24(b)).

The Court in *MSL* recognized that a movant with actual or potential antitrust claims against the defendant in the government case "amply" satisfies the first requirement for intervention. *Id.*; *see also American Cyanamid,* 719 F.2d at 562. The movant satisfies the second requirement by identifying "adequate grounds for upsetting" the decree. *MSL,* 118 F.3d at 782-83.

B. CCIA And SIIA's Antitrust Claims Have Issues Of Law And Fact In Common With The Government's Antitrust Case.

CCIA and SIIA are archetypically appropriate intervenors – private plaintiffs with antitrust claims that overlap with the Government's case. Other circuits have joined this Court in holding that an "overlap of legal and factual issues" between the underlying antitrust questions in a Tunney Act case and a private party's "substantive antitrust claims" satisfies the commonality requirement under Rule 24(b). *MSL*, 118 F.3d at 782; *see also, e.g., American Cyanamid*, 719 F.2d at 562-63.

Like the plaintiff in *MSL*, CCIA and SIIA "amply" satisfy the "commonality" test for permissive intervention because their members' private

claims against Microsoft parallel the DOJ's claims in the Government case. *MSL*, 118 F.3d at 782. Indeed, the associations' members include the very firms this Court identified as the targets of Microsoft's anticompetitive conduct. *See Microsoft*, 253 F.3d at 59-78 (describing Microsoft's illegal campaign against Netscape and Sun Microsystems).

As this Court has repeatedly held, an association may prosecute its members' claims if "[1] its members would otherwise have standing to sue in their own right, [2] the interests it seeks to protect are germane to the organization's purpose, and [3] neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit." *Fund Democracy, LLC v. S.E.C.*, 278 F.3d 21, 25 (D.C. Cir. 2002); *see also United States Telecom Ass'n v. FCC*, 295 F.3d 1326, 1330 (D.C. Cir. 2002). All three of these requirements are satisfied here.[7] Accordingly, CCIA and SIIA satisfy the commonality requirement for intervention. *See MSL,* 118 F.3d at 782-83.

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[7] Microsoft never challenged the latter two conditions for associational standing. *See* Mot. for Summary Affirmance, *United States v. Microsoft,* No. 03-5030, at 7 (D.C. Cir. Feb. 24, 2003). And the third requirement is plainly satisfied by this Court's conclusion that certain association members were the direct and principal victims of precisely the illegal acts the consent decree is required to remedy. *See id.*; *see also Microsoft*, 253 F.3d at 59-73, 74-78; Mot. to Intervene at 11 (R.764); *Fund Democracy*, 278 F.3d at 25.

C. The Delay Occasioned By This Appeal Is Not "Undue" Because CCIA and SIIA Have Identified More Than "Adequate Grounds For Setting Aside the Consent Decree."

Litigants seeking to intervene in a Tunney Act proceeding must also demonstrate that the delay occasioned by an appeal would not be "undue." *MSL*, 118 F.3d at 782. CCIA and SIIA similarly satisfy this requirement. There will be no delay whatever caused by this appeal because this Court will have to decide the proper remedy for Microsoft's antitrust violations in the States' appeal regardless of what happens here. In *United States v. LTV Corp.*, moreover, this Court observed that the touchstone for permissive intervention in a Tunney Act case is whether the putative intervenor would be able to show that the settlement should not have been approved. *See* 746 F.2d 51, 54 (D.C. Cir. 1984). Elaborating on this standard, the Court explained in *MSL* that where "the attempted intervenor shows adequate grounds for upsetting the consent judgment, then delay will be entailed (a remand for further proceedings, possibly including trial), but it would be hard to say that the delay is undue." 118 F.3d at 782-83. That is precisely the case here.

The "peek at the merits" of Appellants' claims envisioned by *MSL* reveals ample "grounds for upsetting the consent judgment." *Id.* As detailed in the following sections, there are numerous ways in which the consent decree in this case will prove — and has proven — unenforceable, fatally ambiguous and overtly

harmful in (i) remedying Microsoft's past antitrust violations and (ii) preventing recurrence of the same conduct. *See* Part II *infra*.

The District Court thus erred in denying Appellants' motion for intervention on the ground that its opinion approving the settlement demonstrated that their concerns about the consent decree lacked merit. *See* Order at 8 (R.770) ("Movants' arguments with regard to defects in the Final Judgment . . . were reviewed by the Court in making its public interest determination and found not to fatally undermine the Proposed Final Judgment."). This bootstrap reasoning defeats the whole purpose of Tunney Act review. Under the District Court's test, intervention in Tunney Act proceedings would always be denied. That is not the law. *See, e.g., American Cyanamid,* 719 F.2d at 562-63.

II. THE CONSENT DECREE SHOULD NOT HAVE BEEN APPROVED.

It is well established that a consent decree is not "in the public interest" if it fails to remedy antitrust violations found by the courts. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129, 136 (1967); *MSL*, 118 F.3d at 182 (approval should not be granted where there is a substantial "discrepancy between the remedy and substantially undisputed facts" underlying the violation). "[B]oth the applicable remedial legal standard and the liability determination" here "are clear." Joint Status Report, *United States v. Microsoft Corp.*, at 28 (D.D.C. 9/20/01) (R.628). The remedies imposed in the consent decree must "seek to

'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *Microsoft*, 253 F.3d at 103 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972), and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)). The decree here does none of these things. Instead, it allows conduct that has already been found illegal by two prior courts. That the Tunney Act court should effectively overrule the judgment of the prior district court and this Court's unanimous *en banc* decision is intolerable.

A decree also fails to satisfy the public interest, this Court has said, if "any of [its] terms appear ambiguous, if the enforcement mechanism is inadequate, [or] if third parties will be positively injured" by its approval. *MSL*, 118 F.3d at 783 (citing *Microsoft*, 56 F.3d at 1462). There can be no doubt that this decree is ambiguous and that its enforcement mechanisms are worthless. As a result, Appellants' members will be positively injured because it will be very difficult to persuade future courts that conduct permitted by the decree is illegal.

This Court vacated the remedial order by the previous district judge, in part, because the judge failed to explain how his proposed structural remedy would accomplish the goals of effective antitrust relief. *See Microsoft*, 253 F.3d at 103. In approving the consent decree, the District Court below did exactly the same

thing – it failed to explain how "its remedies decree would accomplish th[e] [remedial] objectives" identified by this Court. *Id.* Its excuse was that it was obliged to "accord deference" to the Government's assessment of the litigation risk associated with a trial on more stringent remedies. *Microsoft,* 231 F. Supp. 2d. at 152. But the only "litigation risk" the Government identified – the causation standard on remand – was a purely legal issue that not only entitled the Government to no deference, but was squarely decided against the Government by this Court.[8] This Court held that the Government had "plainly" made out an unrebutted *prima facie* case of "harm to competition in the operating systems market." *Microsoft,* 253 F.3d at 67. That is unmistakably a finding of causation. There was thus no basis for the District Court to defer to the DOJ's "predictions as to the effect of the proposed remedies." *Compare Microsoft*, 231 F. Supp. 2d at 152, *with Microsoft*, 56 F.3d at 1458. Rather, the District Court had an obligation independently to assess whether the decree satisfied the remedial goals of the antitrust laws as set forth in this Court's mandate. *See Microsoft*, 253 F.3d at 103.

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[8] The DOJ stated that it adopted the decree because it could not satisfy the strict standard for causation that this Court held would govern the remedy proceedings on remand. Tr. 19:2 (3/6/02) (Beck); *see also id.* at 28:12-14; *id.* at 23-29, 176-77. But as the District Court itself pointed out, this Court's discussion of the stringent causation standard cited by the DOJ concerned the availability of structural relief. *Id.* at 29:5-6. It did not preclude the DOJ from seeking a more comprehensive and effective conduct remedy. *See id.* (Ironically, in its opinion the District Court held that even the conduct remedies at issue here were nevertheless subject to a proportionality test for causation. *See Microsoft*, 231 F. Supp. 2d at 164).

Because the District Court failed to discharge this obligation, and because the decree does not satisfy these goals, the court's judgment approving the decree must be set aside.

A. The Consent Decree Is Not in the Public Interest Because It Fails to Remedy the Specific Antitrust Violations Unanimously Affirmed by This Court.

The District Court's order approving the consent decree must be vacated, first and foremost, because it fails to remedy the specific antitrust violations unanimously affirmed by this Court. *See MSL*, 118 F.3d at 783 (a decree is not the "public interest" where the "discrepancy between the remedy and substantially undisputed facts [is] so broad as to render the decree a 'mockery of judicial power'" (quoting *Microsoft*, 56 F.3d at 1462).

These fundamental failings are apparent with respect to at least two core violations identified by this Court: (1) Microsoft's unlawful integration of Internet Explorer and Windows through code commingling and manipulation of the Add/Remove Programs utility; and (2) Microsoft's exclusionary acts against Java.

1. The Decree Fails to Remedy the Anticompetitive Effects of Microsoft's Unlawful Integration of IE and Windows.

This Court held that Microsoft violated Section 2 of the Sherman Act by (1) "excluding IE from the 'Add/Remove Programs' utility"; and (2) "commingling code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating

system." *Microsoft*, 253 F.3d at 64-65; *see also id.* at 65-67 (emphasizing that these forms of integration lacked "valid technical reasons"). The consent decree does nothing to remedy either of these core violations of the Sherman Act.

The decree's only provision addressing Microsoft's unlawful integration of IE and Windows focuses solely on a user's ability to remove IE *icons*, not functionality or *code*, from the operating system. *See* Final Judgment § III(H)(1) (R.746). The District Court approved this blatantly inadequate remedy as "in the public interest" because it erroneously believed that "the commingling liability in this case . . . did not condemn Microsoft for including middleware functionality along with a product offering operating system functionality." *Microsoft*, 231 F. Supp. 2d at 180. Accordingly, the court reasoned that the remedy for commingling "need not separate the functionalities" of IE and Windows but "need only protect against any anticompetitive effect of the manner in which the functionalities have been bundled." *Id.* Stating that the anticompetitive effect was the "disincentive to OEMs to install non-Microsoft middleware products," the court concluded that the decree's icon removal provision remedied Microsoft's commingling violations by "removing" this "disincentive." *Id.* (finding that the harm from commingling depends entirely upon "'the presence, from the user's perspective, of the product, and consequent confusion and other deterrents to

installation of additional, rival middleware products; the mere presence of APIs is not enough'") (quoting United States Resp. at 119 (R.699)).

This conclusion is wrong for two reasons. First, Microsoft's liability *was* predicated on the unlawful integration of IE functionality, or code, with the Windows operating system. *See Microsoft*, 253 F.3d at 65-66. Second, the anticompetitive effect of unlawful commingling is *not* limited to OEMs and end users. As this Court explained: the "anticompetitive effect" of code commingling is that it "deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, *developers'* interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system." *Id.* at 66 (emphasis added); *see also id.* at 67. The reason *icon* removal is not an adequate remedy for Microsoft's unlawful commingling of IE and Windows *code* is that, from a developer's perspective, the existence (or not) of a particular icon on a user's desktop is immaterial. The relevant question is which API set and related code is present because that is what determines whether developers will continue to write exclusively for IE/Windows or for competing middleware. *See id.*

The District Court's conclusion to the contrary was based on its improper reliance on the suggestion in Finding of Fact ¶ 165 that integration is only significant "from the user's perspective." Response to Public Comments ¶ 226 (R.699); *Microsoft,* 231 F. Supp. 2d at 180-81. This Court's liability determination

was not based on this finding, but on Findings 161, 164, 170, 174-76, and 192, which again make clear that the illegal aspect of integration is *not* just an OEM's inability to remove the IE icon, but IE functionality, or code, from the Windows OS. *See Microsoft,* 253 F.3d at 65-66 (citing the ultimate effect on developers); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 50, 52-53, 56 (D.D.C. 1999) (FF ¶¶ 161-64, 170, 174-76, 192). The fact is that end users have always been able to remove the Internet Explorer icon from the Windows desktop. And OEMs' inability to do so was controlled by illegal licensing restrictions, not technical barriers. *See Microsoft,* 253 F.3d at 61-62. If icon removal were enough to eliminate the anticompetitive effect of Microsoft's unlawful integration of IE and Windows, code commingling and Microsoft's manipulation of the Add/Remove Programs utility would not have constituted antitrust violations. But they did. *See id.* at 65-66. The decree's failure to proscribe either commingling of code or Microsoft's limitation of the Add/Remove Programs utility thus sanctions the very practices this Court unanimously held to be unlawful. *See id.*

The District Court's failure to insist on an adequate remedy for these violations is inexcusable in light of (1) this Court's clear liability findings; and (2) the evidence at the liability trial that IE browsing functionalities could be removed from Windows 98 without damaging the operating system. *See, e.g., Microsoft,* 84 F. Supp. 2d at 54, 55 (FF ¶¶ 179, 184). To be faithful to this Court's mandate, the

decree must prohibit Microsoft from commingling code in the first instance as well as allow end users, through the Add/Remove Programs utility, to remove not just icons, but unwanted middleware applications. Because the consent decree neither remedies Microsoft's core commingling violations nor prevents Microsoft from engaging in precisely these practices in the future, the decree must be vacated. *See Microsoft*, 253 F.3d at 103 (citing *Ford,* 405 U.S. at 577; *United Shoe,* 391 U.S. at 250); *see also International Salt Co. v. United States*, 332 U.S. 392, 400 (1947).

2. *The Decree Does Not Redress Microsoft's Anticompetitive Practices Against Java Technology*

The consent decree also fails to satisfy the public interest because it does nothing to remedy the competitive harm caused by Microsoft's exclusionary acts against various middleware. This fundamental defect is best illustrated by the decree's failure to provide any remedy for Microsoft's illegal conduct against Java. *See Microsoft,* 253 F.3d at 75-79 (holding that Microsoft illegally maintained its Windows monopoly by disrupting Java's distribution).

Microsoft viewed Java as a "potentially lethal competitor" because Java could serve as a platform for software applications that would run on multiple operating systems. *Microsoft*, 253 F.3d at 79. Instead of having to write different versions of the same software programs for different operating systems (Windows, Macintosh, Linux etc.), developers could simply write their applications for Java.

Thus, Java posed a "threat to Windows' position as the ubiquitous platform for software development." *Id.* at 74.

Microsoft responded to this threat by engaging in a series of unlawful acts designed "to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa." *Id.* (internal quotation and citation omitted). Through exclusive agreements, threats against Intel, and outright deception of software developers, Microsoft unlawfully interfered with the growth and distribution of cross-platform Java and instead ensured that a Windows-only Java would eventually become the dominant standard in the market. *See id.* at 76-77.

To satisfy the public interest, the consent decree must make some effort to remedy this unlawful conduct by "terminat[ing] Microsoft's monopoly," *United Shoe*, 391 U.S. at 250, and "restoring" the competitive environment that Microsoft unlawfully destroyed. *Ford*, 405 U.S. at 573 & n.8 (suggesting that in certain circumstances it may be necessary for an antitrust remedy to go beyond restoring the "*status quo ante*"); *Int'l Salt*, 332 U.S. at 401 (a consent decree should "effectively pry open to competition a market that has been closed by defendants' illegal restraints"). The consent decree here does neither of these things. It neither seeks to "restore" the potential that middleware technology, and Java in particular, had to "weaken the applications barrier" protecting Microsoft's Windows

monopoly, *Microsoft,* 84 F. Supp. 2d at 28 (FF ¶ 68), *see infra* Section II.B, nor prevents Microsoft from continuing to engage in the exclusionary acts that it used unlawfully to protect its monopoly from Java's competitive threat.[9]

The District Court's opinion approving the settlement is fundamentally flawed because it fails to address the decree's omission of an effective Java remedy even though precisely such a remedy was before it in *New York v. Microsoft Corp*, 224 F. Supp. 2d 76, 188-89 (D.D.C. 2002).[10] At the close of the States' remedy trial, the District Court rejected proposals for a Java must-carry injunction as unnecessary to remedy Microsoft's Section 2 violations. *See id.* at 188-190. But the court's reasons for rejecting such a remedy cannot withstand scrutiny.

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[9] It is, of course, impossible to know precisely what competition would have looked like had Microsoft not waged its anticompetitive campaign against Java. But the antitrust laws do not permit that uncertainty to operate as an excuse for doing nothing to remedy Microsoft's violations. To the contrary, it is the monopolist who must "'suffer the uncertain consequences of its own undesirable conduct.'" *Microsoft*, 253 F.3d at 79 (quoting 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651c, at 78 (rev. ed. 1996)).

[10] The only references to Java in the decree lack legal or competitive significance. In Sections III(C) and III(H), Java would be included in the list of middleware programs for which Microsoft must permit OEMs to add competing icons to the "Start" menu of Windows XP. But *Java does not have an icon* — it is not a visible application, but a "runtime environment" whose functions are unaffected by a user's ability to access or "launch" it from the desktop. And Section III(H)(2)(b)'s provision allowing Microsoft to ignore its obligations regarding Non-Microsoft Middleware Products if such products "fail[] to implement a reasonable technical requirement," may be used to circumvent even the decree's existing and ineffective requirements concerning Java.

First, the District Court mistakenly believed that a remedy addressing Microsoft's unlawful interference with Java's distribution would be improper because it would simply benefit a competitor. *See Microsoft,* 224 F. Supp. 2d at 188-89. As a threshold matter, Java technology is not proprietary to Sun, so it is inaccurate to characterize a Java remedy as a Sun-specific, "competitor" remedy.[11] But regardless, the fact that a must-carry remedy would benefit Sun in no way detracts from the independent fact that it would serve the public interest by restoring the competitive threat that Java posed to Microsoft's Windows monopoly. It was not only the State Plaintiffs who "regard[ed] the Sun-compliant Java platform as a significant competitive threat to Microsoft's operating system dominance." *Id.* at 189. Microsoft, the previous district judge, and this Court all recognized the "threat" as well. *Microsoft*, 253 F.3d at 76, 79; *Microsoft*, 84 F. Supp. 2d at 28, 105 (FF ¶¶ 68, 386). The District Court's refusal to require a proper injunctive remedy for this violation because such a remedy would benefit Sun was wholly improper.

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[11] "Sun's Java technology is a collection of programming components that create a standard, platform-independent programming and runtime environment." *Sun Microsystems, Inc. v. Microsoft Corp.*, 21 F. Supp. 2d 1109, 1112 (N.D. Cal. 1998), *rev'd on other grounds*, 118 F.3d 1115 (9th Cir. 1999). The Java technology was developed by Sun Microsystems but is now administered as an open industry standard by a body known as the "Java Community Process" (JCP). *See* http://www.jcp.org/en/home/index. The JCP, not Sun, "holds the responsibility for the development of Java technology." *See* http://www.jcp.org/en/introduction/overview.

Second, the District Court rejected the States' request for a Java must-carry remedy based on the erroneous conclusion that "Microsoft's anticompetitive restraints on channels of Java distribution" will be "lifted by other portions" of the consent decree. *Id.* at 189 (alluding to the provisions prohibiting retaliation and exclusive dealing arrangements). But these prospective remedies are inadequate on their own terms.[12]

The must-carry injunction requested by the non-settling States would have required Microsoft to distribute cross-platform Java, as well as Microsoft's own Windows-specific Java, on the Windows operating system. *See id.* at 188-89. Such a remedy would have restored Java's ability to compete on the terms it would have enjoyed but for Microsoft's illegal acts. *See In re Microsoft Corp. Antitrust Litig.*, 237 F. Supp. 2d 639, 645-46 (D. Md. 2002) (granting such relief pending trial). Thus, a must-carry remedy would have satisfied this Court's mandate by

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[12] The decree allows Microsoft to terminate OEM licenses without notice and without an opportunity to cure if an OEM has been given two or more such notices during the lifetime of its license. *See* Final Judgment § III(A). Yet to some extent Microsoft remains free use OEM licensing as a retaliatory tactic because, as the Government itself recognized, "Windows license royalties and terms are inherently complex." CIS at 28, 66 Fed. Reg. at 59,466 (R.650). Accordingly, it would not be difficult for Microsoft to find an OEM in breach of multiple technical requirements of its license if Microsoft wished to take advantage of Section III(A)'s three-strikes provision. Microsoft could similarly manipulate the exception to the decree's prohibition on exclusive dealing by attempting to label what are really exclusive or favored relations with certain OEMs, ISVs etc. as "bona fide joint venture[s]." Final Judgment § III(G).

restoring developers' ability to choose whether to write Java applications for Sun or Microsoft APIs – rather than constraining them to the limited choice unlawfully caused by Microsoft's conduct. The absence of this or any other Java-specific remedy in the consent decree alone renders the settlement insufficient to satisfy the public interest. *See Microsoft,* 253 F.3d at 103; *MSL,* 118 F.3d at 783. Because the consent decree fails to live up to this Court's detailed liability determination, the decree must be vacated. *See Microsoft,* 224 F. Supp. 2d at 154-55 ("Even Microsoft concedes that, at a minimum, the final judgment in this case must address the specific acts found by the appellate court to constitute exclusionary practices in violation of § 2 of the Sherman Act.").

B. The Decree Is Not In the Public Interest Because It Fails to "Terminate the Illegal Monopoly" or "Deprive" Microsoft of the "Fruits" of Its Violations.

The decree not only fails to remedy the specific violations affirmed by this Court; it fails to serve the additional remedial objectives the Supreme Court has identified by "terminat[ing] [Microsoft's] illegal monopoly" and "deny[ing] to [Microsoft] the fruits of its statutory violation[s]." *Microsoft*, 253 F.3d at 103 (quoting *United Shoe*, 391 U.S. 244 at 250). This failing is most apparent in the decree's inability to remedy the unlawful strengthening of the applications barrier to entry protecting Windows that resulted from Microsoft's campaign against Netscape and Java. *See, e.g., Microsoft*, 253 F.3d at 47, 59-74.

The DOJ recognized that "[c]ompetition was injured in this case principally because Microsoft's illegal conduct maintained the applications barriers to entry . . . by thwarting the success of middleware." CIS at 24 (R.650), 66 Fed. Reg. at 59,465. To satisfy this Court's mandate to "terminate" Microsoft's unlawfully maintained monopoly and deprive Microsoft of the "fruits" of its violations *without* imposing structural relief, the decree must impose conduct remedies that undermine the applications barrier strengthened by Microsoft's illegal acts. The DOJ, once again, recognized as much by stating that, to remedy Microsoft's Section 2 violations, the decree must "restore the competitive threat that middleware products posed prior to Microsoft's unlawful conduct." CIS at 17 (R.650), 66 Fed. Reg. at 59,463-64. In fact, the decree does no such thing. As one Tunney Act commentator explained, the decree fashions "middleware provisions that ignore the core Internet browser and Java runtime technologies in favor of undefined, future middleware that may or may not present the same viable cross-platform capabilities." ProComp Comments at 28 (incorporated by reference in R.709).

The decree's (ultimately unsuccessful, *see infra* Section II.C) attempt to address Microsoft's ability to attack future middleware is laudable, but is only half the task. The decree should also have incorporated additional remedies, explored at length in *New York v. Microsoft Corp.,,* to redress the competitive harm already

caused by Microsoft's illegal conduct. *See* 224 F. Supp. 2d 76. For example, a provision requiring Microsoft to disentangle unlawfully commingled browser and operating system code would have helped restore the competitive environment destroyed by Microsoft's unlawful campaign against Netscape and Java. *See, e.g.,* SIIA Comments at 17-20. Similarly, more robust API and disclosure obligations requiring the "open source" distribution of IE code and/or a requirement that Microsoft sell the rights to "port" its dominant Microsoft Office productivity suite of applications to other OS platforms would have satisfied this Court's mandate to "unfetter" the OS market from the effects of Microsoft's violations. *See id.* at 185; *see also Microsoft*, 253 F.3d at 103; SIIA Comments at 27-28, 38-41. Yet the District Court refused to incorporate such remedies in the decree.

This was error. By approving a decree that fails to restore the ability of middleware like Navigator and Java to threaten Windows as alternate applications platforms, the District Court allowed Microsoft to retain the "fruits" of its exclusionary behavior. *Microsoft*, 253 F.3d at 103; *see also, e.g.,* CCIA Comment at 37 ("One of the most important fruits of monopoly conduct is the suppressed development of competitive threats. That is why a forward looking remedy must be rooted in current market conditions, and must restore competition to where it likely would have been absent the anticompetitive conduct") (citing Litan/Noll/Nordhaus Comments at 58-60). The District Court also failed to

"terminate" Microsoft's unlawfully maintained monopoly by requiring the decree to lower the applications barrier to a level that would permit new middleware to pose the same threat to Windows that Netscape and Java did in the mid-1990s. *Microsoft*, 253 F.3d at 103.

The District Court's opinion approving the settlement hardly addresses these clear failures to satisfy this Court's mandate. It simply rejects, in a footnote, arguments by CCIA, SIIA, and many other commentators that this Court's mandate to "terminate the monopoly" and "deny [Microsoft] the fruits of its violations" requires the decree to lower the applications barrier protecting Windows' market share. All the District Court concluded, without discussion, was that "termination" of the monopoly is not a proper remedial objective in a monopoly maintenance action. *Microsoft,* 231 F. Supp. at 154 n.3. But that conclusion is incorrect. As Professor Areeda noted, "a monopoly that has been *created or maintained* by plainly exclusionary conduct is unlawful, and it is the duty of the court to assure its 'complete extirpation.'" 3 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 653i at 105 (2d. ed. 2002) (quoting *United Shoe,* 391 U.S. at 251) (emphasis supplied).

Nor is it an answer to say that the decree satisfies this Court's mandate by allowing OEMs and end users greater flexibility to use non-Microsoft middleware in addition to Microsoft middleware on the Windows OS. Concentrating on end

user choice of middleware, the consent decree ignores that the ultimate objective of capturing middleware market share was to drive *developers* away from cross-platform competitors and towards Microsoft APIs, which in turn would preserve the applications barrier protecting Windows. Microsoft has already garnered the network effects advantages of, for example, replacing Navigator with IE as the dominant Web browser. The real competition today remains, as it was in 1995 through 1998, for software *developers*. The fundamental requirement of an antitrust remedy is "'pry[ing] open to competition a market that has been closed by [a] defendant['s] illegal restraints.'" *Ford*, 405 U.S. at 577-78 (quoting *Int'l Salt*, 332 U.S. at 401). The consent decree's failure to address developers means it cannot effectively lower the applications barrier protecting Microsoft's illegally maintained monopoly.[13]

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[13] In addition, the consent decree, especially its API provisions, focuses only on interoperability with Windows. It does not make Windows API specifications available to direct OS competitors. This limitation means that the decree does nothing to lower the existing applications barrier because it does not enable other operating systems to interoperate with the installed base of third party applications (70,000 or more) that protects the Windows monopoly. *See Microsoft*, 84 F. Supp. 2d at 21 (FF ¶ 40). Moreover, although the theory of liability affirmed by this Court was that middleware can serve as a software development platform and threaten the applications barrier protecting Windows, the decree does not require Microsoft to disclose API specifications for Internet Explorer, Windows Media Player, Microsoft Office or any other Microsoft product (such as .NET) that exposes APIs. The result is that third party applications that depend on these middleware products will increase the applications barrier and reinforce the Windows monopoly by remaining Microsoft-centric.

The District Court erred by failing to demand *something* in the consent decree that works directly to eliminate these fruits of Microsoft's antitrust violations and to reduce the applications barrier protecting Microsoft's Windows monopoly. *See Microsoft,* 253 F.3d at 103; *National Soc'y of Prof'l En'rs v. United States*, 435 U.S. 679, 697 (1978). Accordingly, the decree must be set aside.

C. The Consent Decree Is Not in the Public Interest Because It Does Not Prevent Microsoft From Crushing Future Threats to the Windows Monopoly

In addition to failing to remedy past violations, the decree violates the public interest by failing to "'ensure that there remain no practices likely to result in monopolization in the future.'" *Microsoft*, 253 F.3d at 103 (quoting *United Shoe*, 391 U.S. at 250). If new middleware technologies like Netscape or Java were to appear today, the decree would permit Microsoft to drive them from the market via code integration, deception, and other exclusionary tactics without violating the terms of the District Court's judgment.

Two examples amply demonstrate this point. *First*, the decree's API disclosure provisions require Microsoft to reveal only those APIs "used by Microsoft Middleware to interoperate with the Windows Operating System Product." Final Judgment § III(D). The problem with this provision is that when a nascent competitor appears to threaten the applications barrier, as Netscape and

Java did in 1995, the new technology is *not* one that Microsoft employs in its own middleware. (Or, if the new middleware provider offers functionality broader than that offered by Microsoft's middleware, the new entrant is entitled only to the narrower set of APIs, which may not be broad enough to be useful).

What this means is that a Microsoft competitor can never offer middleware for use on Windows that does more than comparable Microsoft middleware. The decree only entitles the competitor to information concerning the APIs that are necessary for *Microsoft's* programs to operate with Windows. Accordingly, if a competitor's application does more than a comparable Microsoft application and thus needs to invoke more APIs, Microsoft can withhold them under the decree. The result is that the decree deprives the Netscapes of tomorrow of the information they need to compete effectively with Microsoft applications. As the Government recognized, "the slow release of Windows 95 APIs to Netscape is precisely how" Microsoft disadvantaged Netscape in its initial efforts to enter the market. United States Resp. at 155-56, ¶ 311 (R.699); *see Microsoft,* 84 F. Supp. 2d at 33 (FF ¶ 91).

Second, the decree's provisions on OEM inclusion of competing middleware allow the placement of competing icons only if the non-Microsoft product: (1) complies with "reasonable technical specifications" that are determined unilaterally by Microsoft, Final Judgment § III(C)(5); and (2) displays a "user

interface" of the same sort used by Microsoft Middleware, *id.* § III(C)(3). The District Court recognized that these terms "empower Microsoft to control, or at least regulate, the pace of innovation with regard to middleware products." *Microsoft*, 231 F. Supp. 2d at 173. The reason is that the decree allows Microsoft to limit what competitor products do by designing "technical specifications" that will be incompatible with certain functions. Similarly, the "user interface" and other, similar provisions allow Microsoft to limit middleware competition only to the circumstances in which its own products launch. Under these provisions, auto-launch of competing middleware is not permissible if that middleware employs a user interface or window larger or better than those for comparable Microsoft applications.

The District Court nonetheless approved the foregoing provisions based on deference to the Justice Department. *See id.* at 174. As noted above, this was error. There is simply no basis for deference here because the Government's only explanation for its adoption of the inadequate provisions in the decree was an erroneous legal standard. *See supra* at p. 30.

The end result of the Court's decision approving the decree is that the illegal means Microsoft employed to assure the ubiquity of its own APIs – at the expense of Netscape's and Java's – remain available to it today. The decree permits Microsoft to undertake the same exclusionary strategies against other middleware

rivals that it used to extinguish its former competitors. When this issue was raised at the Tunney Act hearing, the DOJ's only defense was that the decree gives OEMs the "[p]ower to replace" Microsoft middleware.[14] But it clearly does not. The decree permits OEMs to add non-Microsoft middleware and replace *icons*, but by ensuring (through its provisions allowing code commingling) that Microsoft's Middleware APIs will be ubiquitous, the decree *guarantees* that anything OEMs may do in the future will have little competitive impact on software developers. As a result, the applications barrier to entry protecting Microsoft's Windows monopoly will not only be preserved, but will be enhanced. For this reason alone, the decree fails to further the public interest in effective antitrust enforcement. *See MSL*, 118 F.3d at 783; *Microsoft*, 253 F.3d at 103.

D. The Consent Decree Is Not in the Public Interest Because It Is Fatally Ambiguous

In addition to its many substantive failings, the decree violates the public interest because it fails to define terms critical to its enforceability. There is no question that an antitrust consent decree's clarity is a key Tunney Act consideration. *Microsoft,* 56 F.3d at 1462 (a consent decree should not be approved under the Tunney Act if it is "ambiguous" or is otherwise unenforceable); *id.* at 1461 (the district judge "should pay special attention to the

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[14] Tr. at 37:6 (3/6/02) (R.731).

decree's clarity"). The consent decree should not have been approved because it either fails to define or, worse, leaves to Microsoft to define, terms that are crucial to identifying and enforcing Microsoft's obligations under the settlement.

Perhaps the best example of this fundamental failing is Section III(D), which governs Microsoft's obligation to disclose APIs to other software companies. This provision is critical because it determines how software made by companies other than Microsoft can run on Windows, the monopoly platform. As the DOJ explained, Section III(D) exists to "ensur[e] that developers of competing middleware – software that over time could begin to erode Microsoft's Operating System monopoly – will have full access to the same interfaces and related information as Microsoft Middleware has to interoperate with Windows Operating System Products." CIS at 33 (R.650), 66 Fed. Reg. at 59,468. In other words, the provision is designed to prevent Microsoft from "hamper[ing] the development or operation of potentially threatening software by withholding interface information or permitting its own product to use hidden or undisclosed interfaces." *Id.* Yet that is precisely what the provision fails to do because it ambiguously defines, or fails to define at all, at least four critical terms: "Windows Operating System Product," "Microsoft Middleware," "Server Operating System Product," and "Interoperate."

"Windows Operating System Product." The consent decree requires Microsoft to eliminate exclusive dealing for "Windows Operating System Products." Final Judgment § VI(U). But the definition of this term is left to "Microsoft in its sole discretion." This fundamental definitional problem alone should have caused the District Court to withhold approval of the decree. The decree's failure to provide a clear, objective definition of what constitutes Windows makes the decree's API disclosure provisions impossible to enforce because developers and would-be competitors cannot discern the scope of the decree's prohibitions. Even worse, it allows Microsoft to engage in precisely the sort of product integration this Court held illegal by permitting Microsoft to define "the software code that comprises a Windows Operating System Product" to include middleware. CIS at 24 (R.650), 66 Fed. Reg. at 59,465.

"Microsoft Middleware." The definition of this critical term is similarly vague. Microsoft Middleware is something that, among other things, must be "distribute[d] separately from a Windows Operating System Product." Final Judgment § VI(J). A product that has the functionalities of middleware but is packaged with a Windows product — if Microsoft decides to call it Windows — is not Microsoft Middleware. And Microsoft is only required to supply rival developers with an API if it is "used by Microsoft Middleware to interoperate with a Windows Operating System Product." *Id.* § III(D). If middleware software is

included with Windows, it is part of a Windows Operating System Product for decree purposes, *so no independent API disclosure obligations attach because Windows APIs are only subject to disclosure where used by Microsoft Middleware.*

The result of this empty definition of "Middleware" is that there is no judicially manageable standard against which to assess whether Microsoft is in compliance with the decree's API disclosure requirements. Software developers have no idea which APIs must be disclosed under the settlement because Microsoft has the power to define both bookends of its disclosure obligation — "Windows Operating System Product" and "Microsoft Middleware."

"Server Operating System Product." The decree similarly fails to define this term even though it largely determines what "Communications Protocols" Microsoft must share with would-be competitors under Section III(E) of the decree. Final Judgment § III(E). The only place this term is discussed is in the CIS, *see* CIS at 37 (R.650), 66 Fed. Reg. at 59,468-469, but as the Supreme Court has recognized, "any command of a consent decree . . . must be found within its four corners." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 244 (1975). And in any event, Microsoft refused to adopt the definitions in the CIS, Tr. at 83:7 (3/6/02), and the "government cannot unilaterally change the meaning of a judgment." *United States v. Bechtel Corp.*, 648 F.2d 660, 665 (9th Cir. 1981).

Thus, there is no way to discern the true scope of Microsoft's Communications Protocol disclosure obligations under the decree.

"Interoperate." The decree's reference to "interoperate" is also undefined. This term is critical because Microsoft must disclose APIs such that competing middleware can "interoperate" with Windows. Final Judgment § III(D); III(E). But nothing in the decree explains what it means for competitive middleware to interoperate with Windows. Among developers, this term has a broad range of definitions. Yet it falls to Microsoft to determine what "interoperate" means — it thus can decide how well competitive middleware should be allowed to work on a Windows PC.

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The decree's inadequate definition of the foregoing terms, among others, gives Microsoft discretion to define the degree of its compliance with the court's judgment. There is no sense in which this result is "in the public interest."

CCIA, SIIA and other major Tunney Act commentators raised this problem in the District Court and pointed out that software developers have no idea which APIs must be disclosed under the decree because Microsoft has the power to define what constitutes Windows and what constitutes middleware. *See, e.g.,* CCIA Comments at 60-65; ProComp Comments at 42-55. But the District Court dismissed these arguments almost out of hand. Observing that Windows Operating

System Products and Microsoft Middleware may contain the same code, the District Court simply concluded that the code for which APIs are needed would be classified appropriately. *Microsoft,* 231 F. Supp. 2d at 166.

This was clearly error because even the parties admitted that they harbored different interpretations of key terms in the decree. For instance, the District Court recognized that the DOJ and Microsoft had offered different understandings of Microsoft's obligation to disclose APIs that would permit middleware to "interoperate" with Windows. *See id.* at 191. The District Court considered this issue resolved by the addition of the words "or communicate" in Section III(E), which now reads "Microsoft shall make available . . . any Communications Protocol . . . used to interoperate, *or communicate* natively . . . with a Microsoft server operating system product." *See id.* (emphasis added). But even if this change were sufficient to clarify the provision, *no corresponding change was made to Section III(D)*, which still requires that API disclosures enable non-Microsoft middleware simply to "interoperate" with Windows. The change to Section III(E) thus only increases the decree's ambiguity.

The parties similarly espoused different understandings of the term "Windows server operating system product." The Government's CIS puts a gloss on this term that is not in the decree, and Microsoft, when pressed by the District Court to state whether it agreed with the CIS, carefully replied only that the

defendant agreed "with the scope and operation of the judgment." Tr. at 83:20-21 (3/6/02) (R.751). Thus, it is far from clear, as the District Court held, that the parties have a "common understanding" of the governing terms of the settlement. *Microsoft*, 231 F. Supp. 2d at 190-91. The end result is that the decree's API disclosure scheme, among other things, does not contain a judicially manageable standard against which to assess whether Microsoft is in compliance with critically important provisions.

E. The Decree Is Not In the Public Interest Because Its Enforcement Mechanisms Are Inadequate and It Affirmatively Harms Third Parties

The decree's failure to define the scope of Microsoft's obligations is not the only problem with its enforceability. The mechanisms it provides for oversight and enforcement are also fundamentally inadequate. The decree vests a "Technical Committee" with authority to monitor "enforcement of and compliance with" the decree. Final Judgment § IV(B)(1) (R.746). But the Committee is neither independent nor qualified to make or enforce legal determinations about Microsoft's failure to comply with the terms of the judgment. The decree gives Microsoft and the Government equal say in the Committee's membership. *See id.* § IV(B)(3). In addition, the decree provides that all the Committee members "shall be experts in software design and programming" but makes no provision for members with sufficient legal expertise to enforce compliance with provisions that

depend, for example, on the "reasonableness" of Microsoft's conduct under the antitrust laws. *Id.* § IV(B)(2).

The means available to the Technical Committee for enforcing compliance with the decree and to the public for reporting and prosecuting violations are similarly inadequate. Third party allegations that Microsoft has violated the decree may be referred to Microsoft's own Internal Compliance Officer, to the Government, or to the Technical Committee. *Id.* § IV(D)(1). But once such complaints reach the Committee, the most that can happen is that it will find the complaints justified and "advise Microsoft and the Plaintiffs of its conclusion and its proposal for a cure." *Id.* § IV(D)(4)(c). If, in response, the plaintiffs seek judicial recourse, none of the "work product, findings or recommendations by the Technical Committee may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the Technical Committee shall testify by deposition, in court or before any other tribunal regarding any matter related to the [decree]." *Id.* § IV(D)(4)(d); *see also id.* § IV(B)(9) (providing that Technical Committee reports will be secret). Accordingly, the Committee's enforcement role is meaningless, and even if a court finally determines that Microsoft has "engaged in a pattern of willful and systematic violations" of the decree, the only specific remedy the decree provides is extension of its empty provisions for an additional two years. *Id.* § V(b).

What the decree's unenforceability means in practice is that the settlement affirmatively harms, rather than protects, victims of Microsoft's antitrust violations. This is most obvious with respect to OEMs and non-Microsoft Middleware providers. For example, non-Microsoft middleware providers typically pay OEMs for the right to have their software included on new personal computers and their program icons placed on the desktop user interface. (Microsoft, of course, enjoys this placement without any remuneration to the OEM.) Section III(H)(3) fundamentally undermines the value of that economic relationship by granting to Windows – merely 14 days after the initial boot-up of a new personal computer – the ability automatically to delete icons on the desktop. *See id.* § III(H)(3). In other words, the middleware provider is only guaranteed two weeks of economic value, substantially reducing the amount of revenue an OEM can charge for critical placement. This is but one example of the many ways in which the decree's meaningless provisions harm the very entities it is required to protect. Because the decree's "enforcement mechanism is inadequate" and "third parties will be positively injured" if it remains in effect, it must be vacated. *MSL*, 118 F.3d at 782; *Microsoft*, 253 F.3d at 1461-62.

III. THE CONSENT DECREE FAILS TO SATISFY THE TUNNEY ACT'S PROCEDURAL REQUIREMENTS.

The consent decree's substantive failings alone compel reversal of the District Court's order. But there is yet another reason to vacate the court's

decision approving the settlement. The parties' failure to comply with the Tunney Act's stringent procedural requirements not only violates the express dictates of the statute; it precludes a determination that the District Court engaged in the requisite "independent" and "informed" review of the consent decree. *Microsoft*, 56 F.3d at 1458; *United States v. Central Contracting Co.*, 527 F. Supp. 1101, 1102 (E.D. Va. 1981).

The Tunney Act's procedural and substantive provisions work hand-in-hand to ensure meaningful judicial review of proposed antitrust settlements, and both sets of provisions must be satisfied before a consent decree may be approved. Indeed, the independent "public interest" determination contemplated by the Act would be meaningless if, by failing to comply with the statute's disclosure requirements, parties could deprive courts and the public of the information they need to engage in informed review of a decree's antitrust relief. As this Court has recognized, the "first" "goal[]" of the Act was to guarantee, through enforcement of the statute's procedural requirements, that "courts would be able to obtain the requisite information enabling them to make an independent determination" about the adequacy of a proposed decree. *United States v. LTV Corp.*, 746 F.2d 51, 52 n.2 (D.C. Cir. 1984) (citing *Central Contracting Co.*, 527 F. Supp. at 1103).

Strict adherence to the Tunney Act's procedural requirements is especially important in this case because the DOJ abandoned its pursuit of effective antitrust

relief in favor of remedies that it previously said would be insufficient to redress Microsoft's antitrust violations. *See supra* note 3. This is precisely the type of information that should have caused the District Court to demand complete and unconditional compliance with the Tunney Act's disclosure requirements.[15] *See generally* Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 Antitrust L. J. 1, 6-8 (1996) (discussing the widely criticized antitrust settlements that led to the passage of the Tunney Act). Instead, the court ignored widespread public criticism of the parties' disclosures and excused what it admitted were borderline filings by both sides. *See Microsoft,* 215 F. Supp. 2d at 11-14. In doing so, the court not only violated the Tunney Act's express procedural requirements; it precluded meaningful review of whether the settlement is truly in the "public interest."[16]

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[15] The Tunney Act "was adopted in the wake of concerns that government consent decrees had been entered in secrecy and without adequate attention to" the bedrock principle that antitrust remedies are designed to benefit the public by promoting competition. *LTV Corp.*, 745 F.2d at 52 n.2; *see also, e.g., In re Int'l Bus. Machs. Corp.*, 687 F.2d 591, 600 (2d Cir. 1982) (noting that the Tunney Act was passed to ensure judicial review of government settlements with powerful antitrust defendants).

[16] Because these procedural errors require that the approval of the consent decree be vacated, CCIA and SIIA satisfy *MSL*'s second requirement for permissive intervention. *See MSL*, 118 F.3d at 782; *see supra* Section I.C. In addition, Appellants moved to intervene as of right based on these errors. *See* Fed. R. Civ. P. 24(a). Under *MSL*, private antitrust plaintiffs may intervene as of right where the parties have failed to provide the requisite disclosures under the Tunney Act. *See* 118 F.3d at 781. Appellants have a legal interest in the withheld documents

(Continued...)

A. The District Court Erred in Holding That the DOJ Satisfied Its Procedural Obligations Under Section 2(b) of the Tunney Act.

Even technical and formalistic failures to comply with the Tunney Act's procedural obligations have been deemed grounds to deny entry of a proposed consent judgment. *See, e.g., Central Contracting*, 527 F. Supp. at 1104. The procedural irregularities in this case are far more significant, and independently undermine the District Court's decision to approve the decree.

As noted above, Section 2(b) of the Tunney Act requires the DOJ to file a CIS that includes, among other things, "an explanation of any unusual circumstances giving rise to [the settlement] proposal" and an "evaluation of alternatives to [the] proposal actually considered by the United States." 15 U.S.C. § 16(b)(3), (6). The statute also requires the Government to make available "materials and documents which [it] considered determinative in formulating [the settlement]." *Id.* § 16(b). The DOJ's disclosures in this case fail to comply with these requirements in at least three critical respects.

First, the CIS fails to identify and explain any "unusual circumstances giving rise to [the decree]" as required by Section 16(b)(3). *See* CIS at 5-9 (R.650), 66 Fed. Reg. at 59,461. This omission is remarkable in light of, among other things, the DOJ's abrupt reversal on remedy and its observation that the entry

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that is not adequately represented by either party. *See id.* Accordingly, the District Court's ruling denying intervention as of right should be reversed.

of a consent decree following an appellate judgment on liability is "unusual and perhaps unprecedented." Tr. at 19:2; 13:5 (3/6/02) (Beck).

Second, the CIS fails to provide a complete description of the settlement's conduct remedies or the requisite "evaluation of alternatives" to the proposal submitted for approval. 15 U.S.C. § 16(b)(6). In describing the conduct remedies in the proposed decree and their impact on competition, the CIS refers broadly to the remedial goals of various provisions but does not address how certain exceptions to those provisions limit their ability to regulate Microsoft's anticompetitive behavior. *See* CIS at 25-53 (R.650), 66 Fed. Reg. at 59,465-59,473. The CIS then proceeds to cite a laundry list of alternate conduct remedies proposed by third-parties that the DOJ dismissed, without "evaluation," on the conclusory ground that the consent decree "provide[s] the most effective and certain relief in the most timely manner." CIS at 63 (R.650), 66 Fed. Reg. at 59,475.

The DOJ's failure to explain its rejection of alternatives proposed by third parties plainly undermines the Tunney Act's disclosure provisions. *See* 15 U.S.C. § 16(b). But the DOJ's failure to explain its decision to adopt conduct remedies less stringent than the interim conduct relief entered by the previous district judge evidences an even greater statutory breach. *See supra* note 3. For example, the DOJ failed to explain how the consent decree's abandonment of the prior district

court's robust definitions of terms like "interoperate" and "Windows operating system" was "in the public interest" in light of this Court's liability determination or any other factor. Thus, even if the District Court were correct (it was not) that the DOJ had no obligation to explain its rejection of *third-party* proposals, *see Microsoft,* 215 F. Supp. 2d at 15, it clearly violated the Tunney Act by approving the settlement without requiring the DOJ to explain its departure from prior judicial remedies.

This was not harmless error. As a result of these procedural violations, the CIS failed to offer any useful guidance to the District Court, or to the public, about why the remedies in the decree are sufficient to remedy the antitrust violations that the DOJ once said could only be redressed by structural relief. 15 U.S.C. § 16(b); *see* CIS at 63 (R.650), 66 Fed. Reg. at 59,475.

Third, the CIS violates the DOJ's statutory obligation to make available all "materials and documents which [it] considered determinative in formulating [a settlement] proposal." 15 U.S.C. §16(b). The CIS responds to this requirement with a blanket statement that "[n]o materials and documents of the type described in the [Tunney Act] were considered in formulating the Proposed Final Judgment." CIS at 68 (R.650), 66 Fed. Reg. at 59,476. That cannot be accurate. Even in antitrust cases that are not nearly as complex as this one, courts have found similar disclaimers "to be almost incredible." *Central Contracting*, 527 F. Supp. at 1104.

The District Court's conclusion that the DOJ's disclosure in this case nonetheless "fully satisfied" the DOJ's obligations under Section 2(b) violates both the letter and spirit of the Tunney Act. *Microsoft*, 215 F. Supp. 2d at 14 ("[a]dmitt[ing]" that the CIS "in this case does not contain the same level of detail" as the "statement filed in conjunction with the settlement of the *AT&T* case," which did not even proceed to judgment at trial).

The District Court explained its decision to excuse the foregoing procedural violations on the basis that the DOJ has discretion to determine what disclosures are necessary to meet its obligations under the Act. *See Microsoft,* 215 F. Supp. 2d at 11-12. This was error. The government's "predictive judgments" about market structure and competitive effect should be accorded a presumption of regularity, *Microsoft*, 56 F.3d at 1460 (quoting *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993), but only when the circumstances are regular. Where, as here, the DOJ's exposition of the reasons for its settlement and its legal interpretation of a governing judicial mandate are woefully lacking, such a presumption of regularity should not apply. Without a reasoned explanation of alternatives and the disclosure of "determinative" documents, the District Court could not discharge its Tunney Act obligation to engage in an independent and informed review of the consent decree. *See* 15 U.S.C. § 16(b). Accordingly, its order approving the decree must be vacated.

B. The District Court Similarly Erred in Approving Microsoft's Manifestly Inadequate Disclosure Under Section 2(g) of the Act.

Microsoft's failure to comply with its disclosure obligations under the Tunney Act only further underscores the impropriety of the District Court's ruling.

Section 2(g) of the Tunney Act required Microsoft to file a "true and complete description" of "any and all written or oral communications" by it or on its behalf "with any officer or employee of the United States concerning or relevant to" the proposed decree. 15 U.S.C. § 16(g). Only settlement negotiations between "counsel of record alone" and "employees of the Department of Justice alone" are exempt from this broad disclosure requirement. *Id.*

When Senator Tunney first introduced the legislation giving rise to the Act, he focused on the significance of the statute's disclosure provisions. "Sunlight is the best of disinfectants," he explained (quoting Justice Brandeis), and thus "sunlight . . . is required in the case of lobbying activities attempting to influence the enforcement of the antitrust laws." 119 Cong. Rec. 3449, 3453 (1973). Minor amendments to Section 2(g) were designed "to [e]nsure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree." H.R. Rep. No. 93-1463, at 6543 (1974)..

The breadth of Microsoft's effort to use political pressure to curtail this case is extraordinary. It is widely known that since 1998 Microsoft has

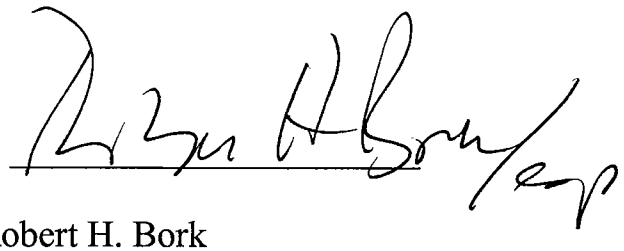
comprehensively lobbied both the legislative and executive branches of the federal government to end this case. *See supra* note 4. But Microsoft did not disclose any of these contacts, much less *all* of them, as the Tunney Act requires. *See* 15 U.S.C. § 16(g). Rather, Microsoft disclosed only meetings that occurred during the last round of settlement negotiations ordered by the Court. *See Microsoft*, 215 F. Supp. 2d at 19. The District Court's approval of Microsoft's insupportable interpretation of its statutory disclosure obligations nullifies the sunshine provisions of the Act and violates the public interest standards that govern this appeal. *Id.* As noted above, this violation alone is grounds for vacating the District Court's judgment. *See Central Contracting,* 527 F. Supp. at 1102-04 (cited by *LTV Corp.,* 746 F.2d at 52 n.2).

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's order denying Appellants' motion for intervention and, on the merits, vacate the District Court's ruling approving the consent decree.

Dated: May 5, 2003

Respectfully submitted,



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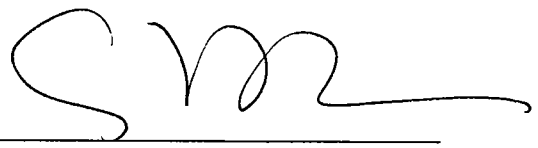
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) and (C), I hereby certify that this brief contains 13,993 words, on the basis of a count made by the word processing system used to prepare the brief.



Elizabeth S. Petrela

STATUTORY ADDENDUM

ADDENDUM A

STATUTES AND REGULATIONS

Table of Contents

UNITED STATES CODE

2000 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 2, 2001

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives

VOLUME SEVEN

TITLE 15—COMMERCE AND TRADE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2001

[101(a)(22)] of the Immigration and Nationality Act (8 U.S.C. 1101(22) [1101(a)(22)]);

"(6) the term 'on a need-blind basis' means without regard to the financial circumstances of the student involved or the student's family; and

"(7) the term 'student' means, with respect to an institution of higher education, a national of the United States or an alien admitted for permanent residence who is admitted to attend an undergraduate program at such institution on a full-time basis.

"(d) EXPIRATION.—Subsection (a) shall expire on September 30, 2001."

[Pub. L. 105–43, §2(b), Sept. 17, 1997, 111 Stat. 1140, provided that: "The amendments made by subsection (a) [amending section 568(a)–(d) of Pub. L. 103–382, set out above] shall take effect immediately before September 30, 1997."]

SHERMAN ACT REFERRED TO IN OTHER SECTIONS

The Sherman Act [15 U.S.C. 1 to 7] is referred to in sections 12, 15c, 15d, 29, 30, 31, 44, 62, 1012, 1013, 3301, 3503 of this title; title 7 section 225; title 10 section 7430; title 12 sections 1828, 1849; title 16 section 2602; title 30 sections 184, 1413; title 40 section 488; title 42 sections 2135, 5417, 5909, 6202, 8235f, 9102; title 43 sections 970, 1331, 1770; title 45 section 791; title 46 App. section 1702; title 49 section 10706; title 50 App. sections 1941a, 2158.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4, 6, 6a, 7, 18a of this title.

§2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, §2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93–528, §3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 101–588, §4(b), Nov. 16, 1990, 104 Stat. 2880.)

AMENDMENTS

1990—Pub. L. 101–588 substituted "$10,000,000" for "one million dollars" and "$350,000" for "one hundred thousand dollars".

1974—Pub. L. 93–528 substituted "a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years" for "a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year".

1955—Act July 7, 1955, substituted "fifty thousand dollars" for "five thousand dollars".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 18a of this title; title 12 section 1849.

§3. Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, §3, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93–528, §3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 101–588, §4(c), Nov. 16, 1990, 104 Stat. 2880.)

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1955—Act July 7, 1955, substituted "fifty thousand dollars" for "five thousand".

§4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

(July 2, 1890, ch. 647, §4, 26 Stat. 209; Mar. 3, 1911, ch. 231, §291, 36 Stat. 1167; June 25, 1948, ch. 646, §1, 62 Stat. 909.)

CODIFICATION

Act Mar. 3, 1911, vested jurisdiction in "district" courts, instead of "circuit" courts.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, substituted "United States attorneys" for "district attorneys of the United States". See section 541 et seq. of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 5 of this title.

§5. Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this

This Act, referred to in text, is act Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended, known as the Clayton Act, which is classified generally to sections 12, 13, 14 to 19, 20, 21, and 22 to 27 of this title, and sections 52 and 53 of Title 29, Labor. For further details and complete classification of this Act to the Code, see References in Text note set out under section 12 of this title and Tables.

EFFECTIVE DATE

Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub. L. 94–435, set out as a note under section 15c of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 15g, 15h of this title.

§ 15g. Definitions

For the purposes of sections 15c, 15d, 15e, and 15f of this title:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this title, and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section 15c(d)(1) of this title.

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "natural persons" does not include proprietorships or partnerships.

(Oct. 15, 1914, ch. 323, §4G, as added Pub. L. 94–435, title III, §301, Sept. 30, 1976, 90 Stat. 1396.)

EFFECTIVE DATE

Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub. L. 94–435, set out as a note under section 15c of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 15h, 34, 37a, 4301 of this title.

§ 15h. Applicability of parens patriae actions

Sections 15c, 15d, 15e, 15f, and 15g of this title shall apply in any State, unless such State provides by law for its nonapplicability in such State.

(Oct. 15, 1914, ch. 323, §4H, as added Pub. L. 94–435, title III, §301, Sept. 30, 1976, 90 Stat. 1396.)

EFFECTIVE DATE

Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub. L. 94–435, set out as a note under section 15c of this title.

§ 16. Judgments

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

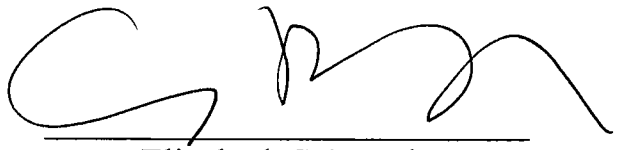
(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the

CERTIFICATE OF SERVICE

I, Elizabeth S. Petrela, hereby certify that on this 5th day of May, 2003, copies of the foregoing brief and the attachments thereto were served via electronic mail* and First Class Mail upon each of the parties listed below.



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